Adrian Tio Sii Hoong & Anor (practising and/or trading under the style and firm of ATCT Architects (a firm)) v Jabatan Kesihatan Negeri Sarawak, Malaysia & Ors

HIGH COURT (KUCHING) — SUIT NO KCH-21–28/12 OF 2012
RHODZARIAH BUJANG J
6 OCTOBER 2016

Civil Procedure — Assessment of damages — Appeals — Court of Appeal allowed plaintiffs' claim for unpaid professional fees and remitted case to High Court for assessment of damages by senior assistant registrar — Professional architect appointed to assist court on calculation of fees due to plaintiffs — Senior assistant registrar agreed with findings of professional architect — Whether professional architect committed errors in his findings — Whether interest, costs of assessment and special damages should be awarded

The trial court had originally allowed in part the plaintiffs' claim for their professional fees in relation to the first defendant's new headquarters which despite the work done by the plaintiffs, another architect was appointed as the consultant of that project. On appeal by the plaintiffs, the Court of Appeal reversed the trial court's decisions and ordered the case be remitted to the High Court for the assessment of fees due to the plaintiffs with the assistance of professional architect. One Philip Chang Foh Bing ('Philip') was appointed to assist the learned senior assistance registrar ('SAR') for the assessment of fees. In his findings, Philip concluded that the total fees payable to the plaintiffs after deducting the sum of RM173,640 ordered by the trial court was RM632,345. However, Philip in his report did not address points on interest, costs of the assessment and special damages. The learned SAR agreed with the figure and did not call up the case for further clarification on the issues of interest, costs of assessment and special damages. Dissatisfied with the learned SAR's decision, both parties appealed against her decision. Both parties contended that Philip had made errors in his findings on the fees payable to the plaintiffs.

Held:

(1) The court was not persuaded to disturb Philip's findings on account that he was not a witness at the assessment hearing but he was an independent assessor whose assistance was mandated by the Court of Appeal. Further, the parties did not question Philip on the alleged errors after he read out his report and finding, instead now, they were saying that Philip committed the alleged errors. Philip was therefore not given an opportunity to explain himself. The parties were at full liberty at the

hearing to adduce their own evidence to contradict Philip's findings but they did not, hence, it was not their respective places to do so now (see para 7).

(2) As raised by Philip, there should have been included in the award, interest on the fees ordered and cost of the hearing. Thus, the court ordered statutory interest of 5%pa on the fees awarded and costs of RM2,000. However, on the issue of special damages, the order of the Court of Appeal was specific enough — the assessment was for the fees due to the plaintiffs — not damages for breach of contract. Thus, on strict compliance with the terms of the said order, the claim for special damages could not be included in the assessment of the fees due to the plaintiffs (see para 8).

[Bahasa Malaysia summary

Mahkamah perbicaraan telah pada asalanya membenarkan sebahagian tuntutan plaintif-plaintif untuk fi profesional mereka berkaitan kepada ibu pejabat defendan pertama yang mana meskipun kerja-kerja dilakukan oleh plaintif-plaintif, arkitek lain yang dilantik sebagai pakar runding projek tersebut. Atas rayuan oleh plaintif-plaintif, Mahkamah Rayuan mengakas keputusan mahkamah perbicaraan dan memerintahkan kes diremit kepada Mahkamah Tinggi bagi taksiran fi yang kena dibayar kepada plaintif-plaintif dengan bantuan arkitek profesional. Seorang yang bernama Philip Chang Foh Bing ('Philip') dilantik untuk membantu timbalan pendaftar kanan yang bijaksana ('TPK') bagi taksiran fi tersebut. Dalam dapatannya, Philip memutuskan bahawa jumlah keseluruhan fi yang kena dibayar kepada plaintif-plaintif selepas menolak jumlah sebanyak RM173,640 yang diperintahkan oleh mahkamah perbicaraan adalah RM632,345. Walau bagaimanapun, Philip dalam laporannya tidak mempertimbangkan poin atas faedah, kos taksiran dan ganti rugi khas. TPK yang bijaksana bersetuju dengan jumlah tersebut dan tidak memanggil kes untuk penjelasan selanjutnya atas isu faedah, kos taksiran dan ganti rugi khas. Tidak puas hati dengan dengan keputusan TPK, kedua-dua pihak merayu terhadap keputusannya. Kedua-dua pihak berhujah bahawa Philip telah membuat kesilapan di dalam dapatannya atas fi yang kena dibayar kepada plaintif-plaintif.

Diputuskan:

(1) Mahkamah tidak diyakinkan untuk campur tangan dapatan Philip atas sebab bahawa dia bukan saksi pada pendengaran taksiran tetapi dia adalah penaksir bebas yang mana bantuannya dimandatkan oleh Mahkamah Rayuan. Selanjutnya, pihak-pihak tidak menyoal Philip atas kesilapan yang didakwa selepas dia membaca laporan dan dapatannya, sebaliknya sekarang, mereka menyatakan bahawa Philip telah melakukan kesilapan yang didakwa tersebut. Philip oleh itu tidak diberikan peluang untuk menjelaskan dirinya. Pihak-pihak mendapat kebebasan penuh

pada pendengaran untuk mengemukakan keterangan mereka sendiri untuk menentang dapatan Philip tetapi mereka tidak berbuat sedemikian, maka, ia bukan tempat mereka sekarang untuk berbuat sedemikian (lihat perenggan 7).

(2) Seperti yang dibangkitkan oleh Philip, faedah atas fi yang diperintahkan dan kos pendengaran sepatutnya dimasukkan dalam award. Oleh itu mahkamah memerintahkan faedah statutori 5% setahun atas fi yang diawardkan dan kos sebanyak RM2,000. Walau bagaimanapun, atas isu ganti rugi khas, perintah Mahkamah Rayuan adalah cukup spesifik — taksiran adalah untuk fi yang kena dibayar kepada plaintif-plaintif — bukan ganti rugi untuk kemungkiran kontrak. Oleh itu, atas pematuhan ketat dengan terma-terma perintah tersebut, tuntutan bagi ganti rugi khas tidak boleh dimasukkan dalam taksiran fi yang kena dibayar kepada plaintif-plaintif (lihat perenggan 8).]

Notes

For a case on appeals, see 2(1) *Mallal's Digest* (5th Ed, 2015) para 2039.

Legislation referred to

Architects Act 1967

Bong Ah Loi (Suhaili & Bong Advocates; Chong Brothers Advocates) for the plaintiffs.

Sandra Ko Chze Siew (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Rhodzariah Bujang J:

[1] On 20 October, 2014, I have allowed the two plaintiffs' claim for their professional fees in relation to the design of the Sarawak Health Department's new headquarters and integrated quarters which despite the work done by them, another architect was appointed as the consultant of that project. After a full trial, I made a finding that the plaintiffs were only appointed on 9 February 2007 to design the headquarters but not the integrated quarters which contract was breached by the defendants and awarded the plaintiffs RM173,640 as damages which sum is stated in their own bill of cost dated 29 September 2006 (at p 269 of exh P4) — not RM3,586,940 as prayed in their statement of claim or RM4,786,940 requested in their counsel's written submission at the end of the trial. I took the view that the work before 9 February 2007 was voluntarily done by them. The plaintiffs appealed against my decision and on 21 August 2015 the Court of Appeal reversed my decision and the relevant prayers in the sealed order read as follows:

(a) The appellants' appeal be and is hereby allowed:

(b) That part of the Order of the High Court dated 20th October 2014 which decided that the appellants had volunteered their services for the period before the Letter of Appointment dated 9th February, 2007; that the package for 'Kuarters Integrasi' did not form part of the appellants' appointment; and that the appellants are only entitled to damages of RM173,640.00, is set aside.

(c) *That the case be remitted to the High Court for the assessment of the fees due the appellants for the Integrated Projects with the assistance of a Professional Architect to be nominated by the President of the Lembaga Arkiteks Malaysia and whose fees shall be borne equally by the appellants and the respondents.* (Emphasis added.)

[2] Following the said order, the learned senior assistant registrar proceeded to assess the fees with the assistance of one Mr Philip Chang Foh Bing ('Mr Philip Chang') who was nominated by Lembaga Arkitek Malaysia in their letter dated 28 December 2015 pursuant to a written request dated 21 December 2015 made by the learned senior assistant registrar for that purpose.

THE ASSESSMENT HEARING

[3] It was held on 1 February 2016 with Mr Philip Chang also present and the plaintiffs' counsel informed the court that they are relying on the same evidence before me and furnished the learned senior assistant registrar with two sets of documents as well as their written submission. The defendants were given time to reply to the submission which they did on 29 February 2016. Mr Philip Chang was given all the said documents and the submissions of counsel and on that date, ie 29 February 2016 it was recorded that he had gone through all the documents and asked four questions which were answered by both the defendants' and plaintiffs' counsel. At the end of that session Mr Philip Chang was recorded to have said these:

> I would suggest that plaintiff help me with the mathematics and do a calculation on the figure that they submit with the supporting documents only. Don't give me all these rubbish documents. Only the documents that matters to show your work and supports your charges. After that then we can reach a figure. You cannot just show me a document these thick with drawings and expect me to tell you how much it cost. Show me what work was done, how was it accepted as done etc.
>
> For example, there was these 1 project I did where they submit 29 pages of drawings and 5 charged RM40 million when 10 pages of the drawings out of the 29 pages was on toilet alone. That does not justify the charges. You understand me?

[4] Thereafter, the learned senior assistant registrar gave the following direction to the parties:

Court: Calculation sheets to be done by the plaintiff and to be submitted to Mr Chang and the court and also to be served to the defendants. We'll do it the way Mr Chang suggested in order to reach a figure.

Plaintiff to supply the same to the defendants and court on/before 18 March 15 2016, defendant to reply on/before 18 April 2016, and last reply by plaintiff on/before 25 April 2016. Mr Chang will then have a look at the documents and give his opinion.

Parties to come back on 5 May 2016 @ 9.00 a.m for ruling.

[5] On 5 May 2016, Mr Philip Chang tendered and read his report — it is comprehensive and contains justification for his eventual conclusion that the total fees payable to the plaintiffs is RM805,985 and after deducting the sum of RM173,640 which I have ordered, the balance owing is *RM632,345*. The learned senior assistant registrar agreed totally with him and assessed the fees payable in that amount. Her ruling was delivered by another senior assistant registrar. The basis of that figure comes under para 6 of Mr Philip Chang's report titled 'Fee Calculation' and his calculation/justification is worth reproducing in full below as is his conclusion in paragraph 7.

6.0 FEE CALCULATION

6.1 The Project started with the Headquarters Design fixed at a Project cost of RM30.00 million. During the course of work it swelled to RM48 million (see Minutes of Meeting, 18th May 2007) before being 'trimmed' back to RM40 million.

6.2 The Kuarters Integrasi Project was budgeted for RM32.5 million. Thus the combined Project cost would be about RM72.5 million.

6.3 It is notable that the second Consultancy team that was appointed subsequently had a total budget of RM45 million for the combined Headquarters and Kuarters Integrasi Project. What this mean is the client could not afford the more expensive design; in a matter of less than two months, a RM72.5 million Project was committed at RM45 million.

6.4 A fair figure to start the base line is to take the average of the two budgets i.e RM58.75 million or RM60 million, in view that so many variables were tentative and scope of work not fully completed. We take the Headquarters portion to be 55% and the Kuarters 45% of the project.

6.5 The total fee for the RM60 million project would be as follows (based on BAM/JKR Form B, Revised 1/83)

= RM798,750.00 + 4% RM (60,000,000.00 - 16,000,000.00)

= RM (798,750.00 + 1,760,000.00)

= RM2,558,750.00

Referring to 6.4, the Headquarters portion = RM (55% X 2,558,750.00)

= RM1,407,300.00 (rounded figure)

A

And the Kuarters = RM45% x 2,558.750.00
= RM1,151,450.00

From paragraphs 5.6 and 5.8 on benefit of a doubt, we established that the Headquarters portion of work reached the Design Development Phase (i.e 30% oftotal scope of work), and the Kuarters Integrasi completed the Schematic Design Phase (i.e 15% of the total scope of work).

B

6.6 Hence, the Headquarters Design Architects consultancy fee
= 45% x RM1,407,300.00
= RM633,285.00 (rounded up)
And the Kuarters Integrasi Architect consultancy fee

C

= 15% x RM1,151,450.00
= RM172,700.00 (rounded up)
Total consultancy fee due around the time of stoppage
= RM633,285.00

D

= RM805,985.00

6.7 Assuming that the Architect Consultants had been paid RM173,640.00 under the letter of Appointment on Man-month basis, then the outstanding fee would be:
= RM (805,985.00 - 173,640.00)

E

= RM632,345.00

6.8 We have no comments on the reimbursable which we leave it to the client to scrutinize and agree to.

7.0 CONCLUSION

F

The above calculation is based on information provided. If the Appeal Court had not given the recommendations if did, the figures will be empirically lower

In any appointment, the Architects Appointment is often defined by three documents: The Memorandum of Appointment, the Architects Scale of Minimum Fees and the Conditions of Engagement of the three, the Conditions of Engagement contains most of the guidelines. The Architect need to follow for smooth interaction with his client. Your Honour may want to refer to this for the final advice on this case. We leave it to your Honour to decide on the final award with consideration of the input herein.

G

H

(Note: There is no '6.9' in the report).

[6] Mr Philip Chang also orally informed the court that he did not in his report address points on interest on the fees, costs of the assessment and special damages. Despite these unresolved three issues, the learned senior assistant registrar did not call up the case for further argument or clarification. The plaintiffs and defendants are equally aggrieved by the above decision of the senior assistant registrar and have filed their respective appeals against her decision.

I

THE APPEAL

[7] Counsel for both parties have in their respective written submissions pointed out the errors of Mr Philip Chang's findings but which with respect, I am not persuaded to disturb on account of firstly, this one factor — he was not a witness at the assessment hearing but as correctly labelled by the plaintiff's counsel, an 15 independent assessor. Mr Philip Chang's assistance was mandated by the Court of Appeal and the court in its wisdom knew that only one who comes from the same profession as the plaintiffs would be in a better position to determine what is just and due to them. Additionally and this is the primary reason, after he read out his report and finding both counsel did not seek to question him on the alleged errors 20 that they are only now saying was committed by him. Mr Philip Chang was therefore not given an opportunity to explain himself. Further the parties were at full liberty at the hearing to adduce their own evidence to contradict the findings of Mr Philip Chang but did not. I do not therefore think it is their respective places to do so now. Finally, I would have to say that after going through Mr Philip 25 Chang's report and like the learned senior assistant registrar, I am also satisfied with the findings and/or calculations made by him and see no reason to depart from them. He is fully entitled to use his experience and the industry's or profession's norms as well as practice to arrive at the conclusions as he did as long as they do not contravene the governing legislation for architects ie the Architects Act 1967 and rules made thereunder.

[8] However, as raised by him, there should have been included in the award interest on the fees ordered and cost of the hearing. I would therefore order that the statutory interest of 5%pa on the fees awarded and is to commence from the date of the learned senior assistant registrar's decision ie 5 May 2016 until full settlement and since the assessment of the fees was in the plaintiffs' favour, cost of the hearing without the calling of witnesses and merely with the tendering of written submissions is fixed at RM2,000. As for the special damages of RM75,274.15 prayed for being disbursements incurred by the plaintiffs and which their counsel said in para 17 of his skeletal submission has been allowed by the Court of Appeal, with respect I see nothing of that nature being itemised in the sealed order of the court which I had reproduced early in this judgment. The order was specific enough — the assessment was for the fees due to the plaintiffs — not damages for breach of contract. Thus, on a strict compliance with the terms of the said order, the claim for special damages cannot be included in the assessment of the fees due to the plaintiffs. As for the cost of this appeal, I order each party to bear their own costs.

Order accordingly.

Reported by Dzulqarnain Ab Fatar